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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RADIO MUSIC LICENSE COMMITTEE, INC.,

Plaintiff,

v.

GLOBAL MUSIC RIGHTS, LLC,

Defendant.

Case No. 2:19-cv-03957-TJH-AS

PLAINTIFF AND COUNTER-DEFENDANT GLOBAL MUSIC RIGHTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO:

FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1) FOR LACK OF SUBJECT MATTER JURISDICTION; AND

FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) FOR FAILURE TO STATE A CLAIM

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I. INTRODUCTION

The fundamental flaw in this case is that Radio Music Licensing Committee ("RMLC") asserts antitrust claims based on an increase, not a decrease, in competition. Although it purports to describe a "monopoly" and "restraint of trade," RMLC's complaint in fact describes competitive entry into a previously oligopolistic market and a healthy expansion of trade that benefits songwriters.

For 80 years, there were but three performance rights organizations ("PRO"): ASCAP, BMI, and SESAC. In 2013, Global Music Rights became the first new PRO in many decades. GMR offers songwriters better service, royalty transparency, and higher rates than those offered by the ensconced industry incumbents. GMR utilized a fresh, writer-first mentality and innovative business approach to build a repertory of 81 songwriters and associated music publishers.

GMR's entry is a boon to songwriters, but an anathema to RMLC. Far from a victim, RMLC is a price-fixing cartel representing 10,000 radio stations and 90% of U.S. terrestrial radio revenue, whose avowed purpose is to aggregate its members' buying power to "keep license fees for the commercial radio industry as low as [it] can possibly keep them."[1] To that end, RMLC does not want songwriters—the artists who create the music radio stations play—to benefit from greater competition among PROs. Instead, RMLC seeks to depress pay to artists, limit the number of competitor PROs, stunt progress in the market, and impose heavy regulation on any new PRO that dares to enter. The cartel asks this Court to protect it from market forces, deny songwriters the admitted benefits of GMR's competitive entry, and sit in perpetuity as a "rate court" to adjudicate all future rate disputes individually. The Court should decline that invitation and dismiss RMLC's complaint, which is unmoored from industry practice, reality, and the law.

First, RMLC misrepresents precedent when it contends that any PRO is

[1] Evidentiary Hearing Tr. at 24:9-11, *Radio Music License Comm., Inc. v. SESAC, Inc.*, No. 2:12-cv-05807-CDJ, Dkt. 53 (E.D. Pa. Dec. 9, 2013).

"anticompetitive, essentially by its very nature." (Second Amended Complaint ("SAC") ¶ 15.) As the Supreme Court held, a PRO is subject at most to antitrust's "rule of reason" rather than any *per se* prohibition. *BMI v. CBS, Inc.*, 441 U.S. 1 (1979). Thus, a PRO can be subject to liability under Section 1 or 2 of the Sherman Act only if, among other things, it has market power in a well-defined market.

Second, RMLC cannot plausibly allege that GMR has market power because GMR controls rights to less than *one-tenth of one percent of songs available for performance* and, as RMLC admits, GMR represents "nowhere near a 15% share of total music spins" performed on radio. (SAC ¶ 50.) Unable to allege sufficient power in the actual market, RMLC invents an imaginary one—GMR's repertory its own "market" for antitrust purposes. (*Id.* ¶¶ 64-65.)

This attempt to transform GMR from a market participant into the market itself is irrational. Treating GMR as a market itself conflicts with numerous holdings of courts in the Ninth Circuit that "single-brand markets" are limited to cases involving "aftermarkets" for equipment parts and service; with the Tenth Circuit's rejection of a nearly identical claim that a cable channel's library was its own market because it was "essential"; and with the Supreme Court's rejection of any "patent equals market power" presumption.[2] There is no sound basis to disregard this precedent. RMLC also alleges no facts to support its characterization of GMR's repertory as "must have" in the first place. RMLC does not contend that substantially all of its members currently purchase rights to that repertory on the terms GMR has offered. (*Id.* ¶¶ 55-56.) This omission is no oversight, for hundreds of RMLC members have chosen not to take any license from GMR.

Third, even if RMLC had pleaded plausible facts demonstrating monopoly power in a well-defined market, it could not satisfy the second element of a "monopolization" claim: exclusionary conduct designed to marginalize rivals.

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[2] *See Newcal Indus., Inc. v. Ikon Office Sols.*, 513 F.3d 1038 (9th Cir. 2008); *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir. 1992); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

RMLC alleges only that GMR seeks to charge higher rates than RMLC wishes to pay, not that it has impaired competition from other PROs. RMLC's use of "exclusive dealing" jargon is likewise misplaced. Exclusive dealing can support liability under Section 2 of the Sherman Act only when it forecloses third-party *rivals* from a substantial share of the market and thus keeps them below efficient scale.[3] But, RMLC does not and cannot allege that GMR's agreements with its small set of constituent songwriters "forecloses" the astronomically larger PRO rivals or keeps them below efficient scale. At bottom, RMLC is complaining only that GMR has recruited undercompensated songwriters away from ASCAP and BMI, which are price-regulated because they are huge and dominant. In short, the root of RMLC's complaint is about *increased competition*, not *anticompetitive acts*.

Finally, aside from the insufficiency of RMLC's allegations, RMLC lacks standing to seek any monetary relief, including any "order of restitution and/or disgorgement from GMR into a constructive trust of all moneys received from licensees above the judicially-determined reasonable rate" and "distribution of that money *pro rata* to impacted radio stations." (SAC, Prayer for Relief ¶ D(iii).) RMLC asserts only "associational standing," conceding that it has no direct standing to bring this case. (*Id.* ¶¶ 80-85.) In the Ninth Circuit, however, a claim that includes monetary relief requires the individual participation of an association's members—and destroys associational standing. *Fleck & Assocs., Inc. v. Phoenix, City of, an Ariz. Mun. Corp.*, 471 F.3d 1100, 1105-07 (9th Cir. 2006).

This lawsuit is a ploy by RMLC cartel to use antitrust law not to promote competition, but to stifle it. Because antitrust laws encourage the innovation, competition, and market negotiations described in the SAC, the Court should grant GMR's motion to dismiss with prejudice.

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[3] *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 71 (D.C. Cir. 2001) (en banc).

II. CASE BACKGROUND[4]

For almost 100 years, behemoths dominated the licensing of public performances of compositions on terrestrial radio. On the licensor side, the PRO titans are ASCAP and BMI, each of which controls the rights of tens of thousands of songwriters and millions of compositions.[5] On the licensee side of the table, the RMLC cartel has aggregated the buying power of the overwhelming majority of major radio broadcasters, many of whom are mutual competitors. Its declared purpose is to use collective bargaining to "keep license fees for the commercial radio industry as low as [it] can possibly keep them." (*Id.* ¶¶ 11, 46; Note 1, *supra*.)

Although this market structure has been oligopolistic on both sides, only the dominant PROs have been subject to regulation. Beginning in the 1940s, the Department of Justice sued ASCAP and BMI for violating antitrust laws due to their massive size and near total control of the musical compositions then-available for public performance.[6] The duopoly PROs entered consent decrees with DOJ

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[4] On this motion, GMR must accept as true the factual allegations in RMLC's complaint. "Legal conclusions" masked as "facts," however, receive no deference and may be disregarded. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[5] It is not disputed that ASCAP, BMI, and SESAC collectively have over one million affiliates and twenty million compositions. First Am. Compl. ("FAC") ¶ 27 ("ASCAP . . . licenses the musical works of 585,000 songwriters, composers and publishers, and has more than 10 million musical works in its repertory. BMI . . . licenses the works of more than 750,000 songwriters, composers, and publishers, and has nearly 12 million musical works in its repertory."); We Create Music, https://www.ascap.com/about-us (700,000 affiliates); ASCAP Payment System, https://www.ascap.com/help/royalties-and-payment/payment (over 11.5 million works); What We Do, https://www.bmi.com/ about (900,000 affiliates; 14 million works); Compl. ¶ 23, *Radio Music License Comm., Inc. v. SESAC, Inc.*, No. 2:12-cv-05807-CDJ (E.D. Pa.), Dkt. 1 (in 2012 SESAC had 23,000 affiliates); About SESAC, https://www.sesac.com/#/our-history (30,000 affiliates, 400,000 works); FAC ¶ 44 (GMR represented approximately 70 songwriters and 26,000 compositions); Global Music Rights, https://www.globalmusicrights.com (81 composers; 38,000 works); Answer ¶ 25, *Global Music Rights, LLC v. Radio Music License Comm., Inc.*, No. 2:16-cv-09051-TJH-AS (C.D. Cal.), Dkt. 84 (ASCAP and BMI represent "majority" of composition owners). To the extent the Court deems it necessary, it may judicially notice the approximate sizes of the U.S. PROs, which are "generally known" matters of public record, "not subject to a reasonable dispute," and "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201.

[6] *See e.g.*, Compl. ¶ 4, *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. Feb. 26, 1941) ("ASCAP Compl.") (alleging ASCAP controlled 75% of copyrighted

requiring them to license their repertories to every radio station in the United States and, if the parties could not agree on a price, to submit the matter to a "rate court," a federal court in the Southern District of New York. (SAC ¶¶ 15-17.) As DOJ explained in 2000, the consent decrees were "intended[] to facilitate *entry of new competitors* to ASCAP in administering music performance rights." DOJ Mem. at 17 (emphasis added).

Music industry legend Irving Azoff and PRO veteran Randy Grimmett took notice. In 2013, they formed Global Music Rights, the first new PRO competitor in decades. (SAC ¶ 26.) GMR entered agreements with a small group of successful songwriters and publishers by offering them better financial terms (*id.* ¶ 27), transparency, and personalized, "boutique" services. GMR's repertory consists of songs written by 81 writers. *See* Note 5, *supra*. Disproving RMLC's erroneous legal assertion that the "overwhelming consensus" is "unregulated PROs violate the antitrust laws" (SAC ¶ 26), the Director of DOJ's Antitrust Division said publicly in 2018: "With the establishment of Global Music Rights in 2013, there is now a fourth PRO *competing* to include music in its repertory and license users."[7]

In 2014 or 2015, GMR sought to negotiate licenses for RMLC's members. (SAC ¶¶ 47-48.) RMLC rejected GMR's proposals. (*Id.* ¶¶ 49-51.) Flexing its monopsony might, RMLC told GMR that it would not enter any deals unless GMR agreed to compulsory licensing and rate-setting arbitration, just like ASCAP and BMI. (*Id.* ¶ 54.) Blocked from negotiating through RMLC, GMR sought to deal directly with RMLC members. Only *two* of 3,000 RMLC members—0.067%—

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musical works); Mem. of U.S. in Support of the Joint Mot. to Enter Second Am. Final Judgment ("DOJ Mem.") at 14, *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. Sept. 4, 2000), *available at* https://www.justice.gov/atr/case-document/memorandum-united-states-support-joint-motion-enter-second-amended-final-judgment (ASCAP's market power based on "large number of compositions" in repertory).

[7] Press Release, Assistant Attorney General Makan Delrahim Delivers Remarks at the National Music Publishers Association Annual meeting (June 13, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-national-music-publishers (emphasis added).

agreed to a license with GMR. (*Id.* ¶ 57.)

Because GMR would not accede to its demands, RMLC sued GMR in Pennsylvania, alleging that GMR was an illegal monopolist. (*Id.*; Dkt. 1.) GMR moved to dismiss for lack of personal jurisdiction and failure to state a claim. (Dkt. 51.) Rather than oppose GMR's motion, RMLC filed a First Amended Complaint, alleging the same deficient claims. (Dkt. 52.) GMR moved to dismiss, and the district court granted GMR's jurisdiction motion and transferred the action to this District. (Dkts. 57, 58, 116, 117.) It did not rule on GMR's 12(b)(6) motion.

In the meantime, and with the assistance of the Pennsylvania court, GMR and RMLC negotiated terms of an "interim license" pursuant to which RMLC members could, at their election, secure a license from GMR for specified periods of time, pending the litigation. RMLC does not allege that all or virtually all RMLC members took an interim license. (SAC ¶¶ 55-56.)

Rather than re-file the FAC, RMLC amended again. The complaint fails to state a claim for which relief can be granted, plus RMLC lacks standing to seek the restitution and *pro rata* distribution monetary relief requested in the complaint.

III. RMLC'S COMPLAINT FAILS TO STATE A CLAIM ON WHICH ANTITRUST RELIEF CAN BE GRANTED

To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 547. This requires more than buzzwords, rhetoric, or a "sheer possibility" that defendant "acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Relevant here, RMLC must plead—but fails to plead—the elements of antitrust liability. For its Section 2 claims, RMLC must allege facts showing both market power within a well-defined market and exclusionary conduct that harms competition. For its Section 1 claims, RMLC must plead the details of an alleged conspiratorial agreement that violates the "rule of reason."

A. <u>The "Monopolization" Claims (Counts III and IV) Fail Because RMLC Cannot Plead Market Power or Exclusionary Conduct.</u>

RMLC claims GMR has monopolized or attempted to monopolize the market in violation of Section 2 of the Sherman Act. (SAC ¶¶ 109-120.) To satisfy its burden, RMLC must allege **(1)** monopoly power; and **(2)** the willful acquisition or maintenance of that power (or the attempt to acquire that power), distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident—also known as exclusionary conduct. *Kaiser Found. Health Plan, Inc. v. Abbott Labs, Inc.*, 552 F.3d 1033, 1043 (9th Cir. 2009); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997).

1. GMR Does Not Possess Market Power.

RMLC's Section 2 claims require plausible allegations that GMR has acquired "market power" or a dangerous probability of achieving it. "Market power" means at least a clear and enduring majority share of a properly-defined market. *Image Tech. Servs.*, 125 F.3d at 1206 (65% "generally require[d]" for monopolization); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (30% "presumptively insufficient" for attempted monopolization); *M&M Med. Supplies & Servs., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168 (4th Cir. 1992) ("30% [to] 50%" should "usually be rejected" for attempted monopolization). A plaintiff must establish market power with direct or circumstantial evidence. *Rebel Oil*, 51 F.3d at 1434. RMLC fails to plead either.

a. <u>No Direct Evidence of Market Power</u>. The Ninth Circuit recognizes that, because buyers and sellers operate in markets with innumerable decision points, direct evidence of market power is rare. *Rebel Oil*, 51 F.3d at 1434. Direct evidence requires an allegation that defendant **(1)** successfully imposed supracompetitive prices on customers; and **(2)** restricted output of its product. *Id.*; *see Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997), *overruled on other grounds by* 693 F.3d 896 (9th Cir. 2012); *Safeway Inc. v. Abbott Labs.*, 761 F. Supp. 2d 874, 887 (N.D. Cal. 2011). RMLC characterizes its "direct evidence" of

market power as "abundant" (SAC ¶ 65), but the facts alleged, even accepted as true, show nothing of the sort. The allegations actually establish the opposite: that GMR has ***no*** market power under the *Rebel Oil* test.

Supracompetitive Prices. To plead the "supracompetitive price" element of market power, a plaintiff must allege that the defendant not only asked for, but succeeded in imposing, supracompetitive prices. "Demands" for higher prices do not establish market power—they are "statement[s] of bargaining terms." *Am. Mfrs. Mut. Ins. Co. v. Am. Broad. Paramount Theatres, Inc*., 446 F.2d 1131, 1137 (2d Cir. 1971). As one court put it, "that BMI *sought* certain fee levels does not make it an antitrust violator. An asking price is a bargaining position." *Nat'l Cable Television Ass'n v. BMI*, 772 F. Supp. 614, 643 (D.D.C. 1991) (emphasis in original).

Here, RMLC does not claim—nor could it claim—that GMR successfully imposed supracompetitive prices on a substantial number of RMLC members. Indeed, RMLC admits that, as a matter of fact, only two of its 3,000 members (0.067%) actually agreed to GMR's price demands before this lawsuit was filed—and thus before the parties submitted to a court-administered negotiation of the interim licenses. (SAC ¶ 65 ("GMR's demands during negotiations with RMLC, to which almost all member stations *would have had to accede absent this lawsuit*, are direct evidence of its monopoly power."[8] (emphasis added).) Because RMLC admits that GMR did not impose its allegedly supracompetitive rates on RMLC members, at least before litigation, the SAC forecloses rather than provides direct evidence of market power. *Am. Mfrs. Mut. Ins.*, 446 F.2d at 1137 (no market power

[8] While Paragraph 66 of the SAC does say "RMLC members are currently paying interim license fees to GMR," RMLC does not contend in the complaint, nor could it argue in opposition, that the interim license fees are direct evidence of market power. As part of the court-administered negotiation of the interim licenses, the parties agreed "not to use the negotiation of or existence of any interim license with any RMLC member in any way." *See* Mem. at 32-33 (Dkt. 116). Further, RMLC does not allege that all or virtually all RMLC members elected to secure an interim license. (SAC ¶¶ 56-57.)

where plaintiff abandoned negotiations, such that plaintiff never felt any "economic pressure" from defendant); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13 (1984) (market power is the "special ability" to "force a purchaser to do something that he would not do in a competitive market"), *abrogated on other grounds by* 547 U.S. 28 (2006).

That fact sharply distinguishes this case from RMLC's prior lawsuit against SESAC. In *RMLC v. SESAC*, RMLC alleged that SESAC effectively "raised prices from 8% to 20% each year since 2009" without a corresponding increase to its repertory and without losing sales. *Radio Music License Comm., Inc. v. SESAC*, 29 F. Supp. 3d 487, 500 (E.D. Pa. 2014). These allegations of actual price increases "directly allege[d] monopoly power." *Id.* Likewise, in *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177 (NRB), 2011 WL 856266 (S.D.N.Y. Mar. 9, 2011), the court held that the plaintiffs had adequately alleged market power in part because, "in spite of SESAC's increase in fees, virtually all local stations in the country still ha[d] a SESAC blanket license" and "ha[d] not reacted to SESAC's price increases by replacing SESAC licenses with alternative licenses." *Id.* at *10.

Even if RMLC had alleged that GMR succeeded in charging more than ASCAP or BMI had charged, a court may not infer market power based solely on higher price. "[W]hen dealing with a heterogeneous product or service"—like GMR's new performance rights licenses—"a reasonable finder of fact cannot infer monopoly power just from higher prices." *Harrison Aire, Inc. v. Aerostart Int'l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005). "[GMR's] comparatively high price may simply reflect a superior product" rather than market power. *Id.* RMLC seeks to circumvent this rule by obscuring the fact that GMR's curated license is totally unlike the capacious licenses offered by ASCAP and BMI. One cannot reasonably infer market power from the fact GMR may charge more for a completely different and higher-quality product.

An analogy illustrates RMLC's failing: suppose Big Art Gallery in New

York City charges $10 admission to view its collection of 1,000 paintings, 900 of which are by obscure contemporary artists and 100 of which are by Italian Renaissance masters. Upstart Little Art Gallery buys the 100 Renaissance paintings and charges $9 admission to view them. Patrons could not logically claim that this must be an exercise of "market power" by Little Art Gallery on the theory that patrons previously were paying $1 on average to see the same Renaissance paintings at Big Art Gallery. The same is true here—RMLC cannot logically claim that GMR's license fee must be an exercise of market power on the theory that RMLC members previously were paying something less on average to perform the same compositions when they were controlled by ASCAP or BMI.

No Restricted Output. As noted, a plaintiff relying on "direct evidence" of market power must show not only supracompetitive prices, but also restricted output. RMLC skips over this element altogether—for good reason. RMLC does not and cannot plead facts that GMR tried to restrict output of its performance licenses, much less that GMR has done so successfully. *Forsyth*, 114 F.3d at 1476; *see Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2288 (2018) ("Market power is the ability to raise prices profitably by restricting output."); *Stewart v. Gogo, Inc.*, No. C-12-5164 EMC, 2013 WL 1501484, at *4 n.3 (N.D. Cal. Apr. 10, 2013) (plaintiff who did not plead restricted output could not directly establish market power; dismissing complaint). Indeed, RMLC alleges that GMR attempted to force its licenses on ***all*** radio stations (SAC ¶¶ 27, 65)—the opposite of output restriction. *See Nationwide Power Sols., Inc. v. Eaton Elec. Inc.*, No. SACV 07-883 JVS (FFMx), 2008 WL 11408997, at *8 (C.D. Cal. Oct. 10, 2008) (plaintiff must show defendant "restricted its own output").

b. <u>No Indirect Evidence of Market Power</u>. Because RMLC has no viable allegations to support the "direct evidence" path, it spends the balance of the SAC trying to plead "indirect evidence" of market power. To defeat a motion to dismiss, RMLC "must define the relevant market, and show that (i) the defendant owns a

dominant share of that market and (ii) there are significant barriers to entry and existing competitors lack the capacity to increase their output in the short run." *PNY Techs., Inc. v. SanDisk Corp.*, No. C-11-04689 YGR, 2012 WL 1380271, at *6 (N.D. Cal. Apr. 20, 2012) (citing *Rebel Oil*, 51 F.3d at 1434, 1439). The relevant market must encompass ***all*** products that are reasonably interchangeable for the purposes for which they are produced. *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1163 (9th Cir. 2003). The standard is not one of literal equivalence or identicality; all "roughly equivalent" products must be included. *LAI v. USB-Implementers Forum, Inc.*, No. CV 14-05301-RGK (PJWx), 2014 WL 12600969, at *5 (C.D. Cal. Nov. 21, 2014) (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997)). A proposed market is "facially unsustainable" and the proper subject of a 12(b)(6) motion to dismiss where it excludes obvious substitute products. *Packaging Sys., Inc. v. PRC-Desoto Int'l, Inc.*, 268 F. Supp. 3d 1071, 1084 (C.D. Cal. 2017); *see Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1121-22 (9th Cir. 2018) (affirming dismissal of antitrust case where plaintiffs' alleged relevant markets "omit[ted] many economic substitutes").

The relevant market here is performance licenses to copyrighted songs aired on terrestrial radio in the United States. GMR's repertory of 81 composers is tiny compared to the tens of thousands of composers affiliated with other PROs.[9] RMLC itself alleges that GMR's "spin share"—the "percentage of plays of works that GMR controls"—is "nowhere near a 15% share of the total music 'spins'" on radio stations (SAC ¶¶ 49-50 (emphasis omitted))—far short of the market-power threshold. *See Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) (25% market share insufficient; affirming dismissal).

Realizing this, RMLC proposes a facially implausible market definition. In a bid to "gerrymander its way to an antitrust victory," *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 683 (4th Cir. 2016), RMLC alleges that GMR

[9] *See* Note 5, *supra.*

monopolized a market consisting solely of *itself*. (SAC ¶¶ 63, 64.) RMLC's "market of one" theory fails as a matter of law. *Bayer Schering Pharma AG v. Watson Pharm., Inc.*, No. 2:07-CV-01472-KJD-GWF, 2010 WL 11578470 (D. Nev. Mar. 31, 2010) ("Merely alleging that a product is unique is insufficient to plead a relevant market").

"It is an understatement to say that single-brand markets," like that alleged by RMLC, "are disfavored." *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 361 F. Supp. 3d 324, 343 (E.D.N.Y. 2019). Courts in this Circuit refuse to recognize single-brand markets except in the "single-product aftermarket" context.[10] "[S]ingle-brand aftermarkets" have four features: **(1)** two separate but related markets, one of which is a derivative aftermarket; **(2)** anticompetitive conduct relating only to the aftermarket; **(3)** defendant's power in the aftermarket flows from special access to consumers based on a contractual relationship in the primary market; and **(4)** market imperfections that prevent consumers from knowing their choice in the primary market will impact their freedom in the aftermarket. *Newcal*, 513 F.3d at 1049-50. RMLC alleges ***none*** of these factors.

Because "courts have been extremely reluctant to embrace" the single-brand market theory, even in the aftermarket context, there is no basis for "extend[ing] it to other types of goods." *Streamcast*, 547 F. Supp. 2d at 1094-95; *Portney v. CIBA*

[10] *Newcal Indus., Inc. v. Ikon Office Sols.*, 513 F.3d 1038, 1049-50 (9th Cir. 2008); *Teradata Corp. v. SAP SE*, No. 18-cv-03670-WHO, 2018 WL 6528009, at *16 (N.D. Cal. Dec. 12, 2018) (no single-brand theory except in "limited exception" of "single-product 'aftermarket[s]' in which customers do not agree on restrictions that were undisclosed at the time of the purchase of the product from the primary market"); *Streamcast Networks, Inc. v. Skype Techs., S.A.*, 547 F. Supp. 2d 1086, 1094 (C.D. Cal. 2007) ("the few cases in which courts have acknowledged the possibility of limiting the relevant market to a single brand have involved markets for replacement parts for specific brands of durable goods where consumers are 'locked in'"); *AFMS, LLC v. United Parcel Serv. Co.*, No. CV 10-05830 MMM (AJWx), 2011 WL 13128436, at *19 (C.D. Cal. Nov. 23, 2011) (single-brand market cases "are more properly characterized as 'aftermarket' cases"); *Payment Logistics Ltd. v. Lighthouse Network LLC*, No. 18-cv-00786-L-AGS, 2019 WL 1239281, at *2 (S.D. Cal. Mar. 18, 2019) (rejecting single-brand market theory); *Blizzard Entmt. Inc. v. Ceiling Fan Software LLC*, 941 F. Supp. 2d 1227, 1234 n.6 (C.D. Cal. 2013) (rejecting single brand-market theory; dismissing complaint); *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1197 (N.D. Cal. 2008) (same).

Vision Corp., 593 F. Supp. 2d 1120, 1127 (C.D. Cal. 2008) (antitrust cases "frequently" dismissed for defining an implausible market because they involve "failed attempts to limit product markets to a single brand, franchise, or institution."); *Hicks*, 987 F.3d at 1121 (affirming dismissal of antitrust claims; plaintiffs' market definition was "artificial" and "contorted").

RMLC claims that "[e]very court to have addressed the question" has concluded that a PRO is a market unto itself. (SAC ¶ 63.) That bold statement both ignores Ninth Circuit authority and is wrong. Several courts have rejected RMLC's position. For example:

- In *Affiliated Music Enterprises, Inc. v. Sesac, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir. 1959), plaintiff sued SESAC under Section 2 of the Sherman Act alleging that SESAC had monopolized the market for SESAC's gospel compositions. The court rejected that market definition, concluding instead that the proper market was "performance rights in gospel music" generally. *Id.* at 875, 877; *see also Affiliated Music Enterprises, Inc. v. Sesac, Inc.*, 268 F.2d 13, 15 (2d Cir. 1959) ("performance rights in gospel music constitute the relevant market").

- In *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), the court held that ASCAP had monopoly power, not because ASCAP was its own market, but because ASCAP controlled "80% of all the music recorded in motion picture films." *Id.* at 847.

- In *National Cable Television Association v. BMI*, 772 F. Supp. 614 (D.D.C. 1991), the court dismissed antitrust claims against BMI despite its large presence in "the music performing rights market." *Id.* at 643.

- In *BMI*, the Supreme Court observed that "even small-performing rights societies . . . have occasionally arisen to compete with ASCAP and BMI" in a "market for public-performance rights." 441 U.S. at 20, 22. By describing the small PROs as "compet[ing]" with ASCAP and BMI, the Supreme Court of the United States recognized that their repertories are *not* markets unto themselves. Other courts—and DOJ—have repeatedly acknowledged that PROs compete against one another in the same market.[11]

RMLC's "market of one" also improperly excludes obvious substitute

[11] *See ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 79 & n.2 (2d Cir. 2012) ("ASCAP's size grants it monopoly power in the performance-rights market"; BMI "represents most of the remaining composers in the American market"); *United States v. ASCAP*, Civ. No. 13-95 (WCC), 1989 WL 222654, at *20 (S.D.N.Y. Oct. 12, 1989) ("the relevant market is one for aggregative performance licenses"), *aff'd*, 912 F.2d 563 (2d Cir. 1990) ; *see also* ASCAP Compl. ¶ 4 (alleging that ASCAP controlled performance rights to 75% of copyrighted musical works generally); DOJ Mem. at 14, 23 (stating that "competition from other PROs" constrains ASCAP's market power, and music users can "substitut[e] music from another PRO's repertory").

products. *Packaging Sys.*, 268 F. Supp. 3d at 1084. The relevant market must include all products that are "reasonably interchangeable by consumers for the same purposes." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). Here, licenses offered by the four PROs to radio stations serve the same purpose, which is to allow the stations to perform legally musical compositions.

RMLC insists that GMR licenses are not interchangeable with those of other PROs because "ASCAP, BMI, and SESAC do not offer licenses that confer the right to publicly perform the works in GMR's repertory." (SAC ¶ 66; *see id.* ¶ 68 (alleging that a new PRO "could not constrain GMR's monopoly power because only GMR has the exclusive ability to license the essential musical works in its repertory").) This is equivalent to arguing that Honda is not in the same market as Toyota because it does not manufacture the cars in Toyota's lineup. Courts have routinely rejected such specious logic. For example, in *Turner Network.*, 964 F.2d at 1025, the Tenth Circuit rejected the argument that the TNT cable channel was a market unto itself. *Id.* Like GMR, television stations like TNT presumably offered a "unique" package of copyrighted works, such that consumers who only had access to ESPN, HBO, or the History Channel could not access the "works in [TNT]'s repertory." (SAC ¶ 67.) But that did *not* mean TNT was a monopolist in a market of its own programming. *Turner Networks*, 964 F.2d at 1025.[12]

Indeed, the Supreme Court has rejected the idea that market power can be inferred from the control of "unique" intellectual property. *Ill. Tool Works*, 547 U.S. at 44-46; *Lexmark Int'l, Inc. v. Impression Prods., Inc.*, 816 F.3d 721, 753 (Fed. Cir. 2016). And courts around the country have consistently refused to

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[12] RMLC's characterization of PRO licenses as "complements," not substitutes, is nonsensical. (SAC ¶ 62.) "Complementary" products serve fundamentally different purposes but nonetheless go together—for example, "a driver needs both gasoline and tires to drive." *Am. Express Co.*, 138 S. Ct. at 2295 (Breyer, J., dissenting). PRO licenses allow music users to legally perform musical compositions. That makes them substitutes, not complements. *See HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 547 (8th Cir. 2007) (differently-priced products with "identical uses" belonged to the same market).

uphold alleged markets of "unique" copyrighted works or "unique" collections of copyrighted works. *See, e.g.*, *Spinelli v. NFL*, 96 F. Supp. 3d 81, 111-13 (S.D.N.Y. 2015) (market for "commercial licensing of NFL-related stock photographs" was implausible, as it excluded licenses to other "sports-related photographs"), *aff'd*, 903 F.3d 185 (2d Cir. 2018); *Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, 391-92 (E.D.N.Y. 2004) (rejecting argument that a "single supplier's movies" could constitute a market); *cf. SolidFX, LLC v. Jeppesen Sanderson, Inc.*, 935 F. Supp. 2d 1069, 1083-84 (D. Colo. 2013) (holding that copyrighted works could not be treated as an essential facility) (quotation omitted); *Curtin Maritime Corp. v. Santa Catalina Island Co.*, No. 2:16-cv-03290-TJH-AGR (C.D. Cal. Feb. 20, 2018), Dkt. 60, at 5-6 (rejecting similar "essential facilities" argument).

Pushed to its logical conclusion, RMLC's position would mean every popular songwriter possesses "market power" over his or her own copyrighted songs. Suppose Bruce Springsteen, whose "well-known" body of work many consider "must-have," decided to handle his own licensing in lieu of affiliating with a PRO. (SAC ¶ 4.) A radio station with licenses from all four U.S. PROs would not have "the right to publicly perform the [Springsteen] works." (*Id.* ¶ 66.) According to RMLC, "whatever [other PROs] might supply," they could not "supply a substitute for what [Mr. Springsteen] sells." (*Id.* ¶ 68.) By this logic, Mr. Springsteen would be "completely immune from competition" and a monopolist in his own market. (*Id.*) That cannot be. *See Rock River Commc'ns, Inc. v. Universal Music Group, Inc.*, No. CV08-635 CAS (AJWx), 2011 WL 1598916, at *15 (C.D. Cal. Apr. 27, 2011) ("[D]efining the market as consisting of Bob Marley sound recordings is too narrow to be relevant for antitrust purposes.").

In a variation on the same theme, RMLC alleges that the songs in GMR's repertory are "essential" and that GMRO licenses thus are not interchangeable with other PROs' licenses. (SAC ¶¶ 62, 65, 68.) RMLC never defines "essential," but

appears to use the term in two senses: *First*, RMLC alleges that the songs in GMR's repertory are very popular and thus, are "must have" for radio stations. (SAC ¶¶ 4, 88.) *Second*, RMLC alleges that radio stations must buy GMR licenses because they cannot avoid playing GMR songs inadvertently or on syndicated programming. (SAC ¶ 61.) Neither makes GMR a market of one.

As to the first theory, the fact that many consumers prefer the songs in GMR's repertory does not make GMR a monopolist. *See LAI*, 2014 WL 12600969, at *5 (relevant market encompasses "roughly equivalent" products, even if there is "some degree of preference for one [product] over the other") (quoting *Queen City Pizza*, 124 F.3d at 437); *Global Discount Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705 (S.D.N.Y. 1997) (Sotomayor, J.) (noting that NBC would not be its own market simply because consumers prefer "Friends," "Seinfeld," and "E.R." to shows on other networks). In *Mediacom Communications Corp. v. Sinclair Broadcast Grp., Inc.*, 460 F. Supp. 2d 1012 (S.D. Iowa 2006), the district court rejected allegations that were similar to RMLC's. Mediacom, a cable television system owner, sued Sinclair, a television broadcaster, after negotiations for the rights to retransmit to Sinclair's television stations fell through. *Id.* at 1015-17. Mediacom alleged that Sinclair had an "exclusive hold" on 13 stations that carried "popular network programming [that was] considered essential by Mediacom subscribers." *Id.* at 1026. According to Mediacom, the retransmission rights for each of these stations composed a separate market, since "much of the network programming" on each station was "so unique and 'must see' that there [was] no substitute product." *Id.* at 2026-27. The court rejected this market definition as implausible. *Id.* at 1027-28. The same outcome follows here. RMLC alleges that GMR has an "exclusive hold" on a number of "unique" and "must have" songs, but that does not make these works a standalone market.

As to the second theory, RMLC says stations have "no choice" but to buy GMR licenses because commercials and syndicated programming may contain

GMR works. (SAC ¶¶ 18 n.5, 61 n.8) This has it backwards. RMLC members have to the right to choose, in their individual discretion, to: **(1)** secure a license from GMR; **(2)** insist that the commercial or program provider obtain a "through-to-the-audience" license; or **(3)** not air the program containing GMR's works.

More fundamentally, this argument has nothing to do with antitrust in general or market definition in particular. Even if there were 100 PROs or *no* PROs, radio stations would still face the same legal need to secure rights to whatever music they play, including music included in commercials and third-party programming. PROs such as GMR do not make it more difficult to comply with that obligation; they make it easier by pooling the rights of many artists. At bottom, RMLC is complaining that life was simpler when there were only one or two PROs that could serve as one-stop-shops for all music rights for all radio stations on all occasions. But that is simply a complaint about GMR's successful introduction of competition to the PRO market, not a basis for defining many different single-PRO markets.

2. GMR Has Committed No Exclusionary Conduct.

In addition to allegations of "market power," RMLC's Section 2 claims require plausible allegations of exclusionary conduct. *Kaiser*, 552 F.3d at 1043-44. "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.'" *Microsoft Corp.*, 253 F.3d at 58. Exclusionary conduct requires marginalization of competitors and reduction of competition, *not* conduct that is just a manifestation of market power such as higher prices. *Eastman v. Quest Diagnostics Inc.*, 724 F. Appx. 556, 557 (9th Cir. 2018) (Section 2 claims "not directed 'against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself'") (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)).

1. <u>Fractional Licensing</u>. Contrary to RMLC's *ipse dixit* (SAC ¶ 38), GMR did not invent fractional licensing, which is a ubiquitous feature of U.S. copyright law. Fractional licensing is the result of Congress's determination that

co-owners of copyright (like owners of other property) should be able to decide for themselves whether to permit any one owner to license or to require unanimity before licensing. 17 U.S.C. § 201(d).[13] A PRO can only license what it has the right to license, even if that is just a fractional interest in a work. *See U.S. v. BMI*, 720 F. App'x 14, 16 (2d Cir. 2017). Last year, the Second Circuit rejected RMLC's argument that fractional licensing violated the consent decrees or was exclusionary or anticompetitive. *BMI*, 721 F. App'x at 18.[14]

RMLC's argument on this point is another example of its paradoxical tendency to portray competition itself as anticompetitive. A station would need to account for fractional licensing whether GMR were in the market or not and whether there were 100 PROs or *no* PROs (and thus only direct licensing). RMLC is again complaining at bottom that business was easier when ASCAP and BMI faced no real competition and could thus serve as one-stop-shops for all music rights. RMLC is upset that GMR dared to enter the PRO market in the first place, recruiting songwriters from ASCAP and BMI. But an antitrust plaintiff obviously cannot show anticompetitive conduct simply by pointing to the inevitable byproduct of more competition. In short, because fractional licensing is *a feature of copyright law* and "a reflection of the [PRO] market in general," it cannot constitute exclusionary conduct under the law. *Alarm Detection Sys., Inc. v. Orland Fire Protection Dist.*, 129 F. Supp. 3d 614, 636 (N.D. Ill. 2015).

2. Exclusive Licensing. RMLC argues that GMR's alleged "exclusive contracts" with its affiliates are exclusionary because they prevent direct licensing between radio stations and copyright holders that RMLC says would put downward

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[13] U.S. Copyright Office, Views of the U.S. Copyright Office Concerning PRO Licensing of Jointly Owned Works, at 18-19 (Jan. 29, 2016), *available at* http://www.copyright.gov/policy/pro-licensing.pdf. ("Copyright Office Letter") (calling it "common industry practice" for co-owners to divide ownership of copyright and separately license "their respective shares of the work.").

[14] *See* Copyright Office Letter, at 24 (fractional licensing is an "efficient solution to the management of multi-author works, as [PROs] do not need to examine each work or the surrounding contracts to determine what licensing rule to apply.").

pressure on prices. (SAC ¶¶ 64, 112-13.) This contention fails to state a legally cognizable claim.

RMLC's invocation of the "exclusive dealing" theory is misplaced. Exclusivity arrangements can support Section 2 liability only when they foreclose third-party rivals from a substantial share of the market—at least 40 or 50%—and thus keep the rivals below efficient scale. *Microsoft Corp.*, 253 F.3d at 71; *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004).[15] RMLC does not allege that GMR's agreements with its *81* songwriters "foreclose" ASCAP and BMI, with their *tens of thousands* of songwriters.[16]

Nor do GMR's agreements "foreclose" RMLC itself in any meaningful sense. Despite GMR's agreements with its handful of songwriters, RMLC can still deal with other PROs—or directly with songwriters—for more than 99 percent of available songs. In short, RMLC has not alleged the essential legal predicate of an exclusive dealing claim.

RMLC also failed to allege the essential factual predicate for its theory: that, absent the alleged exclusive contracts, GMR's songwriters would enter direct deals with radio stations, allowing them to "substitute individual direct copyright licenses for a license to the GMR repertory." (SAC ¶¶ 64, 71, 112-13.) Though direct

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[15] The economic basis for this threshold is that exclusive dealing typically is *pro*competitive since it "assure[s] supply, price stability, outlets, investment, best efforts or the like" and thus frequently "pose[s] no competitive threat at all." *E. Food Serv., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2008); *Omega Environ., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) ("well-recognized economic benefits to exclusive dealing arrangements"). Indeed, competition to be an exclusive supplier may constitute "a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress." *Menasha Corp. v. News America Marketing In–Store, Inc.*, 354 F.3d 661, 663 (7th Cir.2004). That is what RMLC alleges here: GMR entered the market and used "exclusive" deals with higher rates to compete with well-established PROs.

[16] Indeed, the consent decrees allow ASCAP and BMI to enter "PRO exclusive" agreements with their writers—*i.e.*, agreements that prevent writers from signing simultaneously with another PRO. ASCAP Consent Decree - Second Am. Final Judgment, *U.S. v. ASCAP*, No. 41-1395, at 6 (S.D.N.Y. 2001), available at https://www.justic.gov/atr/case-document/file/485966/download.

licensing has been available for decades, RMLC does not claim writers engaged in much direct licensing before GMR's entry in 2013. Rather, RMLC alleges that GMR's affiliates licensed their songs *exclusively* through other PROs. (*Id.* ¶ 32.) This consistent practice confirms that direct licensing is not economically feasible. As the Supreme Court explained in *BMI*, direct deals are "virtual[ly] impossib[le]" because "the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants." 441 U.S. at 19-20. "Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers." *Id.*

B. The "Conspiracy" Claims (Counts I, II, and V) Fail Because PROs are Subject to the Rule of Reason and GMR Does Not Have Market Power.

The gravamen of RMLC's Section 1 and Cartwright Act claims is that Irving Azoff, Randy Grimmett, and GMR's affiliates conspired to fix prices. (SAC ¶¶ 86–108, 129–38); 15 U.S.C. § 1; Cal. Bus. & Prof. Code §§ 16700 *et seq*.[17] Even assuming that RMLC adequately pled an agreement between Azoff, Grimmett, a "handful" of songwriters, and associated publishers to form and operate GMR (SAC ¶ 26; *see id*. ¶¶ 27-31, 99, 101), the (supposed) agreement would be subject to the rule of reason. It is hornbook law that joint ventures are analyzed under the rule of reason. *Texaco v. Dagher*, 547 U.S. 1, 5-7 (2006); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (rule of reason is applied to most Sherman Act claims; courts "reluctan[t]" to adopt *per se* rules); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 369 (2001) (rule of reason is the default analysis). The Supreme Court specifically held that BMI, as a joint venture, is subject to antitrust scrutiny under the rule of reason. *BMI*, 441 U.S. at 23-25.

The rule of reason, in turn, requires RMLC to plead and prove market power and anticompetitive effects. *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546

[17] Section 1 claims and Cartwright Act claims are subject to the same standards. *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

F.3d 991, 1001 (9th Cir. 2008); *E.W. French & Sons, Inc. v. Gen. Portland Inc.*, 885 F.2d 1392, 1400 (9th Cir. 1989). Because RMLC has not pleaded and cannot plead either market power or anticompetitive effects, Part III.A.1, *supra*, it cannot maintain a Section 1 or Cartwright Act claim under the rule of reason.

In a transparent maneuver to avoid the rule of reason, RMLC argues that *BMI*'s holding is limited to PROs subject to consent decrees. (SAC ¶¶ 5, 19-20, 33, 43, 75.) The Supreme Court said no such thing. The Court applied the rule of reason to BMI based on procompetitive benefits, such as "integration of sales," "monitoring, and enforcement against unauthorized copyright use," and efficiencies of "blanket licenses." *BMI*, 441 U.S. at 19-22. RMLC concedes GMR exhibits each of these traits. (SAC ¶¶ 35, 37, 60-61.) The *Meredith* case, on which RMLC relies, rejected RMLC's very argument: "If SESAC is to be found liable on the § 1 claim, such liability must derive from application of the rule of reason." *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 203 (S.D.N.Y. 2014); *see also Meredith*, 2011 WL 856266, at *11-12 (Section 1 claims against SESAC were "subject to the more discriminating analysis of the rule of reason"); *RMLC v. SESAC*, 29 F. Supp. 3d at 497-98 (dismissing Section 1 claim against SESAC).

RMLC further suggests that GMR's alleged exclusive agreements, which supposedly prohibit direct licensing, distinguish it from *BMI*. (SAC ¶ 33.) But the Supreme Court did not base its ruling on the absence of exclusive affiliate agreements. Rather, the Court recognized that direct licensing of music users was a "virtual impossibility" entailing "prohibitive" costs. *BMI*, 441 U.S. at 20. Further, a collection of exclusive vertical agreements is not a conspiracy, much less one subject to *per se* treatment. *See In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191-93 (9th Cir. 2015); *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255-56 (3d Cir. 2010).

Next, RMLC contends that because GMR "does not offer a 'full-work' license, it does not 'allow[] the licensee immediate use of covered compositions,

without the delay of prior individual negotiations.'" (SAC ¶ 43.) But as the Second Circuit explained last year, the Supreme Court was not "set[ting] forth a standard that must be satisfied"; it expounded the benefits of blanket licensing. *BMI*, 720 F. App'x at 17-18. A blanket license "reduces transaction costs even if it obviates individual bargaining only as to the fractional rights it includes." *Id.*

Finally, courts "must consider obvious alternative explanations" for an alleged conspirator's behavior. *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1130 (9th Cir. 2015) (affirming dismissal of Section 1 claim). Where factual allegations are equally "consistent" with independent conduct as conspiracy, a motion to dismiss must be granted. *Musical Instruments*, 798 F.3d at 1197; *Prime Healthcare Servs., Inc. v. SEIU*, No. 11-cv-2652-GPC-RBB, 2013 WL 3873074, at *7-9 (S.D. Cal. July 25, 2013) (dismissing Section 1 claim where allegations "insufficiently exclude[d] the possibility of independent action"), *aff'd*, 642 F. App'x 665 (9th Cir. 2016). Here, RMLC conjectures that, absent a conspiracy, it would be "against the individual self-interest of each affiliate" to "join the newly-formed GMR." (SAC ¶¶ 102-03). But RMLC *admits* that GMR "was able to lure these songwriters away from ASCAP and BMI with a promise to pay them rates of 30% more than ASCAP or BMI had paid them." (SAC ¶¶ 30, 49.) A songwriter who agrees to decamp from ASCAP or BMI in favor of GMR based on increased pay acts for, not against the songwriter's individual self-interest. *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1269 (11th Cir. 2019) ("[I]t is hard to imagine how choosing the least costly method of repair, thereby reducing the reimbursement, is contrary to an insurance company's economic self-interest."). When RMLC leveled this parallel "conspiracy" conclusion against SESAC, the court granted SESAC's motion to dismiss, holding "the high royalty and efficient licensing benefits" offered by SESAC were *not* "against the affiliates' self-interest." *Radio Music License Committee, Inc.*, 29 F. Supp. 3d at 497-99. This Court should

dismiss RMLC's Section 1 and Cartwright Act claims for that same reason.

IV. RMLC LACKS ASSOCIATIONAL STANDING

Standing is a requirement for subject matter jurisdiction and ensures that a litigant "assert his own legal interests rather than those of third parties." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Fleck*, 471 F.3d at 1105. Associational standing is a "narrow and limited exception," *United Safeguard Dists. Ass'n, Inc. v. Safeguard Bus. Sys., Inc.*, No. 2:15-cv-03998-RSWL (AJW), 2016 WL 2885848, at *5 (C.D. Cal. May 17, 2016), which allows an organization to sue on behalf of members where **(1)** at least one member would have had standing to make the claim the organization asserts; **(2)** the interests the organization seeks to protect are "germane" to the association's purpose; and **(3)** neither the asserted claim nor the requested relief requires members to participate individually. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Fleck*, 471 F.3d at 1105-06. The third element is key here.

Where an organization seeks *only* declaratory or injunctive relief, members need not participate because individualized proof of each member's extent of injury is unnecessary. *Hunt*, 432 U.S. at 343. But where an organization also seeks monetary relief, individualized proof is required and associational standing is destroyed. Courts that "have addressed this issue have consistently held that claims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the [associational standing] test." *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990).

Lake Mohave Boat Owners Assoc. v. National Park Service, 78 F.3d 1360 (9th Cir. 1995), illustrates the rule. There, an association of boat owners brought suit against the National Park Service claiming the Service charged the association's members excessive fees. *Id.* at 1363. The Association sought a

declaration that the Service's rate demands were unlawful and requested "restitution of excess rents paid." *Id.* at 1364. The Association's "pursuit of restitution of rental fees to members" destroyed associational standing:

> [E]ach . . . member's amount of restitution may differ, since each member paid a per foot fee based on length of slip or length of boat, whichever was greater. Boat size, slip size, and amount of use will be different for each member. Awarding restitution to [plaintiff] on behalf of its members would require individualized proof. Therefore, [plaintiff] lacks standing to bring a claim for this remedy on behalf of its members.

Id. at 1367.[18]

RMLC also seeks monetary relief in the form of a "process" for the "restitution and/or disgorgement from GMR into a constructive trust of all moneys received from licensees above the judicially determined reasonable rate" and "distribution of that money *pro rata* to impacted radio stations." (SAC, Prayer For Relief ¶ D(iii).) Just as restitution for the boat members would require individualized proof (*e.g.*, boat and slip size), restitution for alleged overpayments and "distribution of that money *pro rata*" requires individualized proof in the form of fees paid, number of stations, format of each station, and whether any stations were transferred during the fee period, among others.

Aware that a direct request for restitution and distribution would violate *Lake Mohave*, RMLC asks for an "injunction" to establish a "process" for determining the amount of restitution and pro rata distribution. RMLC may not seek indirectly what it is forbidden from seeking directly. *Rocky Mountain Farmers Union v. Corey*, 258 F. Supp. 3d 1134 (E.D. Cal. 2017), *aff'd in relevant part*, 913 F.3d 940 (9th Cir. 2019), is on point. An association of petroleum manufacturers argued California's process for awarding carbon credits was unlawful. *Id.*at 1139. The

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[18] *See also Cal. Med. Transp. Ass'n, Inc. v. Logisticare Sols., LLC*, No. CV 17-07495 SJO (JC), 2018 WL 5928190, at *5 (C.D. Cal. Jan. 12, 2018) (party seeking "restitution on behalf of its members" lacked associational standing); *United Bhd. of Carpenters & Joiners of Am. v. Metal Trades Dep't, AFL-CIO*, No. 11-CV-5159-TOR, 2013 WL 173016, at *12 (E.D. Wash. Jan. 15, 2013) (no associational standing where plaintiff sought "restitution or disgorgement allegedly owed to each member"; granting motion to dismiss), *aff'd*, 770 F.3d 846 (9th Cir. 2014).

Association, like RMLC here, was careful not to seek damages or restitution directly; instead, the association sought only a declaration requiring a recalculation that could occur later. *Id.* at 1144. The court rejected the association's effort to obtain indirectly what it could not seek directly, holding that "their request for a recalculation of credits . . . [was] effectively a request for damages, or so analogous to a request for damages to render it indistinguishable from [such relief]." *Id.* at 1145. The court recognized that granting the relief would necessitate "a number of individualized determinations," which is incompatible with associational standing. *Id.* The Court should dismiss the complaint. *United Bhd. of Carpenters & Joiners of Am.*, 2013 WL 173016, at *12; *Int'l Bottled Water Ass'n v. Eco Canteen, Inc.*, No. 3:09-cv-299-RJC-DCS, 2010 WL 3719313, at *6 (W.D.N.C. Sept. 17, 2010).

V. CONCLUSION

GMR has breathed competitive life into a stagnant PRO market that had seen no innovation in 80 years. GMR's emergence has already benefitted songwriters—and not just those with GMR. Songwriters who remain at other PROs have been able to negotiate better terms for themselves from GMR's competitors. Antitrust law is designed to encourage this behavior, not stifle it. Because the central premise of RMLC's complaint is fatally flawed, no amount of re-pleading can fix the problem. The Court should dismiss RMLC's SAC with prejudice.[19]

Dated: July 11, 2019

Respectfully submitted,

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By Daniel M. Petrocelli

[19] *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011) (dismissing second amended complaint where plaintiffs "had three bites at the apple"); *Yu-Sze Yen v. Landwin Group, LLC*, No. CV 10-02398-CJC (MLGx), 2010 WL 11549679, at *1, *11 (C.D. Cal. Dec. 8, 2010) (where plaintiffs had "voluntarily amended their complaint twice," dismissing their claims with prejudice).